Supreme Court, U.
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MICHAEL RODAK, JR., CL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-359

JACK M. LOTZE and BEVERLY J. LOTZE, his wife; RONALD M. FROSTAD and FRANCES M. FROSTAD, his wife; ROSA F. MEYER, CLIFFORD E. MEYER, MARILYN J. MEYER, DONALD J. MEYER and EVELYN HOPE MEYER, DARREL HENYAN; and LARRY A. LOEW and PATRICIA E. LOEW, his wife,

Appellants,

vs.

THE STATE OF WASHINGTON,

Appellee.

AN APPEAL FROM THE SUPREME COURT

OF WASHINGTON

JURISDICTIONAL STATEMENT

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UNITED STATES

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Appellants appeal from a judgment of the Supreme Court of Washington which affirms a trial court judgment sustaining against federal constitutional challenge two state statutes which restrict appellant's freedom of speech. Three companion cases heard simultaneously in the trial court were consolidated and considered together on appeal.

OPINIONS BELOW

The single Memorandum Opinion for the three companion cases in the Superior Court for Stevens County, Washington, is unreported. Infra, at page A-4 . The Findings of Fact and Conclusions of Law for the three companion cases in the Superior Court for Stevens County, Washington, are unreported, and are appended hereto, infra pp. A-20, A-30 , and A-40. The Superior Court Judgments

are also unreported and are appended hereto, infra, pp. A-26, A-35, and A- 46. The Notices of Appeal to Division III of the Court of Appeals of the State of Washington are appended hereto, infra, pp. A-52, A-54, and A-56. The Stipulated Motion for Consolidation Pursuant to RAP 3.3(b) together with the Commissioner's Order Granting Consolidation is appended hereto, infra, at p. A-58. The Order of Certification to the Supreme Court of the State of Washington is appended hereto, infra, at p. A-60. The opinion of the Supreme Court of the State of Washington is reported at 92 Wn. 2d 52, 593 P. 2d 811, and is appended hereto, infra, at p. A-63. The Motion for Reconsideration of Decision Terminating Review is appended hereto, infra, at p. A-73

The Order Denying Motion for Reconsideration, dated June 7, 1979, is appended hereto, infra, at p. A-77. The Mandate is appended hereto, infra, at p. A-79.

JURISDICTION

This action was instituted by the appellee in the Superior Court for Stevens County, Washington, to obtain an order allowing the appellee to remove two signs belonging to appellants for which appellants would be compensated, and to remove another sign belonging to appellants as an abatement of an alleged nuisance. Appellants argued that the statutes which prohibited the signs in question, RCW 47.42.030, .040, violated the appellants' right of freedom of speech under the First Amendment to the United States Constitution. The Superior Court entered judgments in favor of the

appellee on June 10 and 13, 1977, after rejecting the appellants' challenge to the constitutionality of the statutes. Appellants appealed these decisions to Division III of the Court of Appeals of the State of Washington. The Court of Appeals consolidated the three cases into a single case for consideration on appeal and certified the consolidated case to the Washington Supreme Court. The Supreme Court of Washington considered the consolidated case and the issue as certified to it, and, on April 19, 1979, entered an opinion affirming the judgments of the Superior Court. Appellants filed a Motion for Reconsideration and the Supreme Court denied reconsideration by an order dated June 7, 1979, filed on June 8, 1979, and issued the Mandate on June 9, 1979, thereby terminating

review in the Washington Supreme Court. A notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Washington and in the Superior Court, Stevens County, Washington, on August 28, 1979. A copy of this notice, together with the proof of service, is appended hereto, infra, at p. A-81. The jurisdiction of this court is invoked under 28 U.S.C. 1257(2). Cases that sustain the jurisdiction of this court include Cohen v. California, 403 U.S. 15 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Standard Oil Co. v. Graves, 249 U.S. 389 (1919).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law... abridging the freedon of speech..."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

RCW 47.42.030 is found in the official edition in Volume 4, at p. 93, and provides in relevant part:

> "Except as permitted under this chapter, no person shall erect or maintain a sign which is visible from the main traveled way of the interstate system, the primary system, or the scenic system. In case a highway or a section of highway is both a part of the primary system and the scenic system, only those signs permitted along the scenic system shall be erected or maintained."

RCW 47.42.040 is found in the official edition in Volume 4, at p. 93, 94, and provides in relevant part:

> "It is declared to be the policy of the State that no signs which are visible from the main traveled way of the interstate system, primary system, or scenic system shall be erected or maintained except the following types:
>
> (1) Directional or other official signs or notices that are required or authorized by law;
>
> (2) Signs advertising the sale or lease of property upon which they are located;
>
> (3) Signs advertising activities conducted on the property on which they are located;
>
> ...". (Full text at Appendix B).

QUESTIONS PRESENTED

The ultimate question presented is whether RCW 47.42.030, .040 are in violation of the provisions in the First Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment to the Constitution, protecting the freedom of speech of the appellants.

This ultimate question involves the following subsidiary questions:

1. Are the statutes in question an unconstitutional prior restraint upon the appellants' right to freedom of speech?

2. Do the statutes violate the First Amendment rights of the appellants to freedom of speech by giving preference to commercial speech over the political speech of the appellants?

3. Are the interests of the appellee in traffic safety and aesthetics unrelated to the results achieved by the statutes, and insufficient to justify the abrogation of the First Amendment rights of the appellants?

4. Do the statutes violate the First Amendment rights of appellants by prohibiting the content of the signs in

question, rather than the place and manner in which they are maintained?

STATEMENT OF THE CASE

The appellants are owners of certain real property located in Stevens County, Washington. The property is contiguous with SR395, which is part of the scenic and recreational system of the appellee. The signs of the appellants were erected on their property, which is outside a commercial or industrial area. The signs are located within sight of SR395, and are maintained in such a manner that they are clearly visible from the main traveled portion of SR395. The signs are used to convey the appellants' personal beliefs, which are of a political or social nature. The signs were never used for any commercial purpose. The provisions of RCW 47.42

control SR395, and the presence of the signs conveying a political message within view of that highway is a violation of RCW 47.42.030,.040, since they do not fall into the category of the exceptions provided in RCW 47.42.040 for certain types of commercial signs. Consequently, the appellee commenced an action in the Superior Court for Stevens County, Washington, to compel removal of the signs, and agreed to pay just compensation for the removal.

HOW THE FEDERAL QUESTION WAS RAISED

The parties stipulated to the facts set forth above, and agreed that the issue before the Superior Court was the constitutionality of RCW 47.42.030, .040. On p. A-5 of the Superior Court's opinion set forth in Appendix A, the following statement reflects this

agreement:

> "Despite the condition of the pleadings, the parties apparently stipulate and agree that even though there was no formal motion therefor, that the Court should interpret RCW 47.42.030 and .040, namely, does the State have the right to abate these signs or to regulate the relationship of signs to the highway, or does it abridge the First Amendment rights related to free speech."

In response to the contention of appellants that the statutes violated their First Amendment right to freedom of speech, the court made the following ruling at pp. A-17 and A-18 of the opinion:

> "Since the Supreme Court of the State of Washington has found billboard signing a hazard to the safety of the highway and since there is merely a curtailment or restriction, limited in distance, but not a denial of the right of free speech, the Court, feeling bound by the rationale of Markham, must uphold the validity of the statute."

On appeal to the Supreme Court of the State of Washington, the issue, as stated in the Order of Certification, infra, at A-61 and A-62, was as follows:

> "The certifiable issue is whether RCW 47.42.030 and RCW 47.42.040 unconstitutionally infringes free speech insofar as they prohibit posting of a sign conveying a social or political message when the sign is visible from a highway."

This was the issue considered by the Washington Supreme Court. See the Washington Supreme Court Opinion, infra, at A-64.

It is apparent that appellants have persistently contended that the statutes in question are unconstitutional, and both of the lower decisions were concerned totally with the issue, and this appeal represents the culmination of the appellants' efforts to preserve intact their First Amendment right to freedom of speech.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

PRIOR RESTRAINT

In Freedman v. State of Maryland, 380 U.S. 51 (1965) the court stated the well established rule that any system of prior restraints of expression comes to the court bearing a heavy presumption against the constitutional validity. In the present case, the statutes in question effect a sweeping prohibition of speech which not only precludes certain types of commercial speech, but also prevents any political or social commentary on the part of the appellants. This prohibition is a prior restraint in violation of the First Amendment inasmuch as it broadly proscribes speech in the form of signs conveying a political message, while expressly condoning speech of a commercial nature, without

any logical basis for drawing such a distinction. Consequently, the statutes in question cannot survive the strict scrutiny given by this Court to restraints on First Amendment rights.

In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), the Court order restricting freedom of speech failed to satisfy the heavy burden placed on such a prior restraint. The reasons for this decision were that the judge's conclusions concerning the impact of the publicity on the recipients of the information were purely speculative, there was no support for the finding that alternative measures would not suffice, and the object to be achieved was not served by the restriction. In the case now before the Court, the appellants' signs are decried as a

menace to safety and aesthetics, the interest advanced by the state. However, the record is totally devoid of any proof to the effect that the signs actually infringe on such interests. The Supreme Court of Washington was also of the opinion that measures less injurious to the constitutional rights of the appellants would not suffice to carry out the legislative mandate implemented by these statutes. In effect, that Court thereby assumed the untenable position that although curtailment of political speech was desirable, certain types of commercial speech in the same place and manner as the proscribed political speech were quite acceptable; the reason given was that unlike the political speech, the commercial speech was "necessary". Finally the Washington

Court referred to the interests of safety and aesthetics as the basis of their decision, as noted above. That Court accepted the proposition advanced by the appellee that the political signs presented a menace to traffic safety and aesthetics. However, the appellee neglected to explain how commercial signs, expressly allowed by RCW 47.42.040 to be erected and maintained in exactly the same manner forbidden to appellants, can remain uncontaminated by the dangerous propensities so fatal to political signs. It is quite evident that there is no basis in fact for the assertion that the interests of traffic safety and aesthetics are advanced by the statutes, because the commercial signs expressly allowed by RCW 47.42.040 violate these interests at least to the same extent as the political signs.

Consequently, according to the rationale of Nebraska Press Association v. Stuart, supra, the statutes have not overcome the heavy presumption against their validity and should be declared unconstitutional.

THE STATUTES GIVE PRIORITY

TO

COMMERCIAL SPEECH OVER POLITICAL SPEECH

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964) this Court recognized the profound commitment of this nation to the principal that debate on public issues should be uninhibited, robust and wide open. Freedom of speech not of a purely commercial nature is in a preferred position. See Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, (1943).

It is true that in Virginia Pharmacy Board v. Virginia Consumer Council, 425

U.S. 748 (1976) and in Bigelow v. Virginia, 421 U.S. 809 (1975), this Court enhanced the status of commercial speech. However, this Court has never stated that commercial speech enjoyed the status preferred to that of political speech. The appellants respectfully suggest that it is error to disfavor political speech in relation to commercial speech. The Washington Supreme Court appears to be taking that position.

The following quotation from their opinion gives credence to this assertion:

> "Unlike on-premise business signs and realty "for sale" signs, political messages such as those of appellants are addressed to the general universality of political ideas.
> A total prohibition of on-premise business signs or realty "for sale" signs, on the other hand may violate the First Amendment under Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra, and its progeny." (at p. A-70).

The Washington Supreme Court appears to be asserting that in view of the generality of political ideas, they are comparatively lacking in importance, and a total ban of political signs in the proscribed area is not unconstitutional. On the other hand, because the commercial signs are "necessary", a similar total ban on commercial signs in the proscribed area is unconstitutional - in violation of the First Amendment.

The Virginia cases have been construed to give precedence to commercial signs over political signs. The appellants believe this is erroneous. On the day when that is indeed the case, the "for sale" signs for which this decision expresses so much concern will not be limited to the roadside, but will be

found firmly embedded in the heart of the First Amendment.

Since this decision is directly in opposition to the profound national commitment to robust discussion of public issues, it must be reversed.

TRAFFIC SAFETY AND AESTHETICS ARE UNRELATED TO THE STATUTES

It has been established supra that the test to be utilized in the present case requires that necessity be the connecting link between the statutes and a compelling state interest. In other words, the statutes must be essential to the furtherence of compelling state interests, which in our case are traffic safety and aesthetics. Again, it cannot be stressed sufficiently that there is absolutely no evidence in the record to support the appellee's contention that the political signs are a danger to

traffic. The Washington Supreme Court simply referred to Markham Advertising Co. v. State, 73 Wn. 2d 406, 439 P. 2d 248 (1968), which is distinguishable on its facts, and based its decision on the appellant's failure to refute that case, thereby introducing the rather novel concept into First Amendment controversies that the person who claims an infringement on his rights by the state must assume the burden of proof.

However, positing for the moment that traffic safety is a viable issue in this case, the contention by the appellee that there is no difference between commercial signs and non-commercial signs in their influence on motorists must be considered. The obvious ramification of this statement is that both political and commercial signs have the same effect

on traffic safety. Nevertheless, certain commercial signs are allowed. Therefore, if political signs have a dangerous effect on traffic safety, the compelling state interest of traffic safety has been effectively vitiated by the exceptions contained in the statute itself, since the commercial signs must have a detrimental effect commensurate with that of political signs. Such a statute certainly cannot be construed to be absolutely essential to traffic safety.

Of course, if commercial signs do not have an effect detrimental to traffic safety, then neither do political signs; in such an event traffic safety is not even an issue.

There remains the compelling state interest in aesthetics. In the Superior Court Opinion, the Court took note of

the appellee's position that the state would have no objection to the sign's presence, so long as the messages were directed inward, (See Appendix A, p. A-15). It appears therefore, that the appellee's objection is not to the structureitself, but to the message being conveyed by the sign. Appellants fail to discern how an objection based on aesthetics can ignore the physical structure and concentrate on the message, unless it is the message itself which is abhorrent to the aesthetic senses of the appellee. Of course, if the objection were to the structure, the appellee would certainly experience great difficulty in attempting to explain how the structures of commercial signs are more aesthetically pleasing than the structures of political signs.

In view of the innately self-contradictory position of the appellee in regard to both of these "compelling" state interests, the inevitable conclusion is that not only are the statutes not essential to a compelling state interest, but are totally unrelated to such an interest.

PROHIBITION OF SPEECH IS BASED ON CONTENT

The appellee avers that the restriction of the appellants signs is legitimate since it is based on reasonable considerations of place and manner. Nevertheless, it is an inescapable fact that the only difference between appellants' signs and the signs specifically allowed by RCW 47.42.040 is the content.

In Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972)

this Court held that under both the Equal Protection Clause and the First Amendment there is an equality of status in the field of ideas and once a forum is open to speech by some groups, government may not prohibit others from speaking on the basis of what they intend to say; selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. Accord Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Community Service Broadcasting of Mid-America, Inc. v. FCC, 593 F. 2d 1102 (D.C. Circ. 1978).

In the present case, the forum in question is an area of land visible from and immediately contiguous with SR395. According to RCW 47.42.040 this forum is

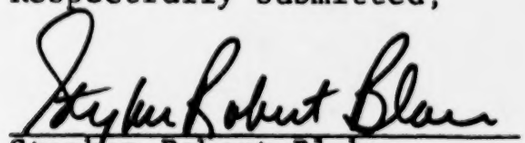
open to signs conforming with the exceptions provided in that statute. Appellants signs do not conform. The only basis upon which their non-conformance within this forum can be ascertained is the content of the signs. Therefore, the statutes in question are in violation of the First Amendment according to the authorities above, because they selectively exclude appellants' signs based solely on their political content, while opening the forum in question to signs containing a commercial message.

CONCLUSIONS

This appeal frames an issue of fundamental importance in that the First Amendment rights of the appellants are being completely abrogated without any justification by the statutes in

question. In addition, the opinions below have both contravened and misconstrued earlier decisions of this Court. Therefore, probable jurisdiction should be noted and the case set down for hearing.

Respectfully submitted,



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APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF STEVENS

STATE OF WASHINGTON,

Plaintiff,

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JACK M. LOTZE and BEVERLY J. LOTZE, his wife, et al,

Defendants.

STATE OF WASHINGTON,

Plaintiff,

v.

LARRY A. LOWE and PATRICIA E. LOWE, his wife,

Defendants.

STATE OF WASHINGTON,

Plaintiff,

v.

ROSA F. MEYER, et al,

Defendants.

NO. 19970

NO. 20007

NO. 20008

MEMORANDUM OPINION

MARCH 22nd, 1977

By complaints in cases numbers 19970 and 20008 the plaintiff seeks an order allowing the state to remove certain signs and paying compensation therefor. In case number 20007, the plaintiff seeks to abate an alleged nuisance, namely a sign that is stated to be maintained contrary to RCW 47.42. 12 (sic). The reasons for the difference were not explained to the Court.

In essence the answer admitted ownership of the property and that the defendants are residents of Stevens County, but denied paragraph III that said signs are visible from SR395, a protected highway and in case number 20007, that said sign is a nuisance. Despite the condition of the pleadings, the parties apparently stipulate and agree that even though there was no formal motion therefore, that the court should interpret RCW 47.42.030 and .040, namely, does the state have the right to abate these signs or to regulate the relationship of signs to the highway, or does it abridge the first amendment rights related to free speech.

The signs are non commercial. They are what is commonly known as

"John Birch Signs" such as, "We don't have a crime wave, we have a wave of vetern (sic) criminals; Join the John Birch Society".

The court finds these are private signs on private property. There was no evidence that there was any commercial use or that they were rented or used by anyone else or that they reflected anything but the personal views and convictions of the owners of the property on which the signs were located.

RCW 47.42.040 permits certain signs to be visible on the main traveled way of the interstate system, such as directional signs, signs advertising sale or lease of property on which they're located, signs advertising activities conducted on

the property on which they're located, signs which would indicate certain advertising activities being conducted on the property on which they're located, signs which would indicate certain advertising activities being conducted at a location within twelve miles of the point at which the signs were located, and other exceptions not pertinent hereto.

RCW 47.42.040 also limits the type and number of signs visible to traffic proceeding in any one direction.

RCW 47.42.060 provides that the commission established may prescribe regulations for erection and maintenance of signs which are visible from the main traveled highway.

It was agreed that the limitation on signs would only be within an area

of 660 feet from the edge of the right-of-way of an interstate highway system.

As stated in State v. Conifer Enterprises, Inc., 82 Wn. 2d 94, any legislative restraint imposed upon First Amendment freedom comes into court bearing a heavy presumption against its constitutionality. The state bears a heavy burden of justification where First Amendment rights are threatened. Only a compelling state interest in the regulation of a subject within a state's constitutional power can justify limiting First Amendment freedoms. The requisite connection between the statute and the permissible state interest is necessity. Mere rationale, reasonable or even substantial relationship will not suffice.

The defendant's First Amendment rights are effected by this statute, namely they are being denied the right to express their own views on their own property by means of sign boards.

The plaintiff submits that this issue has been decided against the defendants in Markham Advertising Co. v. State, 73 Wn. 2d 405, wherein the same statute was interpreted and found to be constitutional. In that case the plaintiffs were outdoor advertising companies. They maintained commercial signs within the prohibited distance from the highway. These occasionally displayed non-commercial messages dealing with political, religious, community and philanthropic matters; possibly, though the opinion does not state, at

the owner's expense. Amongst the reasons for urging the statute should be upheld was the fact that the states must cooperate in removing signs as a condition to payment of ten percent of the possible state's share of federal highway funds, provided also the highways are constructed consistent with federal standards. If the signs are not removed according to federal standards, then the ten percent allotment is foregone. This court concludes that the state may not barter away the First Amendment rights of its citizens for a ten percent federal contribution.

To the argument of the plaintiff that the basic purpose of the act was to promote aesthetic values and, therefore, the act is invalid, the

court said that it is no objection to police power to say that one of its purposes is to promote aesthetic values, mentioning the broad scope of the police power, which has never been cabined. It may be used to promote health, peace, morals, education, good order and the welfare of the people. It must reasonably tend to correct some evil or promote some interest of the state and not violate any direct or positive mandate of the constitution. Thus, provisions of an act which are intended to promote the convenience and enjoyment of the public travel, to protect the public investment and highways and to attract visitors to the state and to conserve the natural beauty of areas are properly included within the scope of the public welfare.

On page 429 of the Markham opinion, in speaking of outdoor advertising, the court quotes from another case in reference to outdoor advertising, namely that,

> "It is forcibly thrust upon the attention of all such persons (who travel on the highways), whether willing or averse. For such persons who strongly wish to avoid advertising intrusion there is no escape; they cannot enjoy their natural and ordinary rights to proceed unmolested."

The court then states,

> "This intrusive quality of highway outdoor advertising, coupled with the hazard it poses to traffic safety and its purely commercial nature, all persuade us that RCW 47.42 is a reasonable regulation which does not violate the First Amendment. There is no blanket requirement that the legislature must subordinate all other legitimate public interests to the protection of free speech."

On page 415 in the Markham case, the court discusses at length the voluminous record in relating to the possible adverse effect upon highway safety of outdoor advertising. Some of it is as to night time lighted signboards. One expert testified that driver's inattention at high speed on heavily traveled highways is particularly dangerous. They must be attentive to road conditions at intersections and interchanges and billboards located in such areas. The witness concluded that outdoor advertising signs are a difinite traffic safety hazard.

The court entered a finding that there was sufficient evidence to permit reasonable men to find that a sufficient relationship exists between

outdoor advertising and traffic safety, delineating such facts supporting such findings.

On page 424 the court stated,

> "We agree with the trial court that, since the result intended in RCW 47.42 is to remove roadside structures which draw driver attention and obstruct the view of the landscape, prohibiting the 'erection' and 'maintenance' of such structures, under the conditions established by the provisions of the Act and the Regulations, is a means reasonably and substantially adapted to that end."

The court stated, page 425:

> "We find, considering the Act's purposes, language and effect, that it is reasonable and necessary and not arbitrary or capricious."

It is true that in this case we are concerned with only three signs, but the result to be reached must consider that the rights of all property owners adjacent to the highway would be fixed, whether they're

in a relatively remote area with few intersections or with other signs. Admittedly, certain signs on a highway are advisable and, in fact, required. The question is, does everyone have a right to place a sign within 660 feet of the right-of-way? Significantly in this case, there is no total exclusion of the right of any defendant to place a sign on his property, but only a curtailment or a limitation of his sign, namely, that it not be within 660 feet of the highway or that if it be, that the message thereon be not facing the highway to distract drivers.

Is such a limitation unconstitutional? The court finds it is not.

The court finds there is little difference in the effect on the motorist between commercial and

non-commercial signs. Highway safety is the dominent factor in the justification to have exercise of police power. The court is unable to conclude that the findings in respect to safety in the Markham case are limited to commercial signs. In Ross v. Goshi, 351 Fed. Supp. 949, a county in Hawaii attempted to prohibit all outdoor political campaign signs, anywhere. The court held this to be unconstitutional but did uphold some reasonable limitation in balancing conflicting interests and would permit some signs, citing as authority, Peltz v. City of South Euclid, 228 N.E. 2d 320, in which a city ordinance attempted to prohibit all political signs whether on public or private property to abate a potential traffic hazard. In that

case the court stated on page 327 that the ordinance is not saved by its purpose to eliminate traffic hazards on main thoroughfares or at the street intersections. The proscription is against all political signs, irrespective of location. The implication of that statement is that if there was a selective proscription which would tend to eliminate traffic hazards on thoroughfares or street intersection, that it would not be struck down. There is no unlimited right of free speech. It involves not only the right to speak but also the right to hear or see and, in addition, the right not to see or not to hear. The right to exclaim "bomb" in an airline terminal is prohibited.

Since the Supreme Court of the State of Washington has found bill-

board signing a hazard to the safety of the highway and since there is merely a curtailment or restriction, limited in distance, but not a denial of the right of free speech, the court, feeling bound by the rationale of Markham, must uphold the validity of the statute. In effect, this court is denying the defendant's right to use the highway for his free speech, when it poses a demonstrated and judicially determined traffic safety problem.

Of interest is the case of Linmark Associates, Inc. and William Mellman v. The Township of Willingboro and Gerald Daly, argued February 28, 1977, before the U.S. Supreme Court which involved a prohibition of all "For Sale" signs on residential property.

An order in harmony with the above may be presented for signature.

Willard J. Roe
J U D G E

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON

IN AND FOR STEVENS COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

JACK LOTZE and BEVERLY J. LOTZE, his wife; et al.,

Defendants.

NO. 19970

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

This matter coming on regularly for hearing before the court this day, plaintiff appearing by Scott C. Neilson, Assistant Attorney General, and defendants Jack M. Lotze and Beverly J. Lotze, his spouse; and Ronald M. Frostad and Frances M. Frostad, his spouse, appearing

by Larry M. Kristianson of Skok & Kristianson, the parties agreeing that no issues of fact exist, but only the constitutionality of RCW 47.24.030 and 040 is in issue, the parties stipulating that the sum of Two Thousand Six Hundred Sixty and no/100 Dollars ($2,660.00) is just compensation if the statutes are constitutional, and having filed a memorandum opinion the court having heard oral argument and considered the briefs and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1.

Plaintiff, Washington State Highway Commission, Department of Highways, is an administrative agency and commission of the State of Washington charged with the statutory duty to construct and maintain state highways in the State of

Washington.

II.

Jack M. Lotze and Beverly J. Lotze, his wife, and Ronald M. Frostad and Frances M. Frostad, his wife, own a sign and property located in the Southwest Quarter of the Northwest Quarter of Section 26, Township 36 North, Range 38 East, W.M., in Stevens County, Washington, lying south and west of right of way for Primary State Highway No. 3, Palmer's Siding to Kettle Falls.

III.

SR 395 is a Federal Aid Primary Highway owned by plaintiff, State of Washington, and is a part of the scenic and Recreational System.

IV.

The subject sign was erected and maintained by defendants.

V.

The sign was granted permit in 1973 by plaintiff pursuant to RCW 47.42.

VI.

The sign is visible from the main traveled portion of SR 395 and located outside a commercial or industrial area.

VII.

The subject sign is used to convey personal beliefs of the owners which are political or social in nature. The sign has never been used to convey commercial messages, nor leased to other parties.

VIII.

The sign existed prior to May 10, 1971.

IX.

The parties stipulate that the sum of Two Thousand Six Hundred Sixty and No/100 Dollars ($2,660.00) constitutes

just compensation for all rights to be acquired in this action.

From the foregoing Findings of Fact the court makes the following:

CONCLUSIONS OF LAW

I.

The court has jurisdiction over the parties and the subject matter.

II.

SR 395 is a highway protected under the provisions of RCW 47.42, and regulations promulgated thereunder.

III.

The named parties having an interest in the sign are entitled to just compensation pursuant to RCW 47.42.102.

IV.

By agreement of the parties the sum of Two Thousand Six Hundred Sixty and No/100 Dollars ($2,660.00) is just compensation for all rights in the sign and

leases thereunder.

V.

RCW 47.42.030 and 040 do not restrict defendants' free speech in violation of the First Amendment.

DATED this 3rd day of June, 1977.

Willard J. Roe
Willard J. Roe, Judge.

Presented by:

SLADE GORTON
Attorney General

Approved as to form and Notice of Presentation waived:

Scott C. Neilson
Scott C. Neilson
Assistant Attorney General, Attorneys for Plaintiff

Larry M. Kristianson
Larry M. Kristianson
of Skok & Kristianson
Attorney for Defendants Lotze & Frostad

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON

IN AND FOR STEVENS COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

JACK M. LOTZE and BEVERLY J. LOTZE, his wife; et al.

Defendants.

NO. 19970

JUDGMENT ESTABLISHING

JUST COMPENSATION

This matter having come on regularly for trial by plaintiff's Complaint to Establish Compensation for Removal of Sign pursuant to RCW 47.42.103, plaintiff being represented by Slade Gorton, Attorney General, and Scott C. Neilson, Assistant Attorney General, defendants Jack M. Lotze and Beverly J. Lotze, his wife,

and Ronald M. Frostad and Frances M. Frostad, his wife, all being represented by Larry M. Kristianson of Skok and Kristianson, the parties having agreed that the Two Thousand Six Hundred Sixty and No/100 Dollars ($2,660.00) offer of compensation for said sign is not in controversy and that the only issue before the court is the constitutionality of RCW 47.42.030 and RCW 47.42.040, the court having considered the records, briefs submitted, argument of counsel, and having made Findings of Fact, Conclusions of Law attached hereto, and the court having rendered a Memorandum Opinion dated March 22, 1977, holding that said statutes do not violate defendants' First Amendment Rights of Free Speech, and being fully advised, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Two Thousand Six Hundred Sixty and No/100 Dollars ($2.660.00) is just compensation for the taking of property and/or property rights as described in Exhibit "A" attached hereto and made a part of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff shall pay the sum of Two Thousand Six Hundred Sixty and No/100 Dollars ($2,660.00) as just compensation into the registry of the Stevens County Court and upon such payment plaintiff shall become the owner of the sign and/or property rights as described in Exhibit "A" and be allowed to enter defendants' property to remove said sign.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That upon payment of the above sum into the registry of the court, the

clerk is hereby ordered to satisfy said judgment and to hold such sum of money for distribution subject to the further order of this court.

DONE IN OPEN COURT this 3rd day of June, 1977.

Willard J. Roe
WILLARD J. ROE, Judge

Presented by:

SLADE GORTON
Attorney General

Scott C. Neilson
SCOTT C. NEILSON
Assistant Attorney General, Attorneys for Plaintiff

Approved as to form and Notice of Presentation waived:

Larry M. Kristianson
LARRY M. KRISITANSON
of SKOK & KRISTIANSON
Attorney for Defendants Lotze and Frostad

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON

IN AND FOR STEVENS COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

LARRY. A LOEW and PATRICIA E. LOEW, his wife,

Defendants.

NO. 20007

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

This matter coming on regularly for hearing before the court this day, plaintiff appearing by Scott C. Neilson, Assistant Attorney General, and defendants Larry A. Loew and Patricia E. Loew, appearing by Larry M. Kristianson of Skok & Kristianson, the parties agreeing

that no issues of fact exist, but only the constitutionality of RCW 47.42.030 and 040 is in issue, the court having heard oral argument and considered the briefs and being fully advised in the premises, makes the following:

FINDINGS OF FACT

I.

Plaintiff, Washington State Highway Commission, Department of Highways is an administrative agency and commission of the State of Washington charged with the statutory duty to construct and maintain state highways in the State of Washington.

II.

Defendants Larry A. Loew and Patricia E. Loew, his wife, reside in Stevens County, Washington, and own a back to back sign located in the NW 1/4 of the NW 1/4 of Section 21, Township 36

North, Range 28 East, W.M. on the north side of SR 395 at SRMP 237.46.

III.

SR 395 is a Federal Aid Primary Highway owned by plaintiff, State of Washington, and is part of the Scenic and Recreational System.

IV.

The subject sign was erected and maintained by defendants.

V.

The subject sign is visible from the main traveled portion of SR 395.

VI.

No permit for the subject sign has been issued, nor has defendant ever applied for same under RCW 47.42.

VII.

The subject sign is used to convey personal beliefs of the owners which are political or social in nature. The sign

has never been used to convey commercial messages, nor leased to other parties.

From the foregoing Findings of Fact the court makes the following:

CONCLUSIONS OF LAW

I.

The court has jurisdiction over the parties and the subject matter.

II.

SR 395 is a highway protected under the provisions of RCW 47.42, and regulations promulgated thereunder.

III.

The erection or maintenance of the subject sign is prohibited by RCW 47.42. 030 and 040.

IV.

RCW 47.42.030 and 040 do not restrict defendants' free speech in violation of the First Amendment.

V.

The erection and maintenance of the sign constitutes a public nuisance as prohibited at RCW 47.42.080.

DATED this 3rd day of June, 1977.

Willard J. Roe
WILLARD J. ROE, Judge

Presented by:

SLADE GORTON
Attorney General

Scott C. Neilson
SCOTT C. NEILSON,
Assistant Attorney General, Attorneys for Plaintiff.

Approved as to Form and Notice of Presentation waived:

Larry M. Kristianson
LARRY M. KRISTIANSON
of SKOK & KRISTIANSON
Attorney for Defendants Loew.

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON

IN AND FOR STEVENS COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

LARRY A. LOEW and PATRICIA E. LOEW, his wife,

Defendants.

NO. 20007

JUDGMENT AND DECREE DECLARING PUBLIC NUISANCE AND ENJOINING DEFENDANTS.

This matter having come on regularly for trial by plaintiff's petition for Injunction and Abatement of Public Nuisance, plaintiff being represented by Slade Gorton, Attorney General, and Scott C. Neilson, Assistant Attorney General, defendants being represented by Larry M.

Kristianson of Skok & Kristianson, the parties having agreed that the sign in question is in violation of RCW 47.42.030, 040, et seq, if said statutes are not in violation of defendants' First Amendment Rights of Speech, the court having considered the records and briefs submitted, having heard discussion of counsel, and having rendered a memorandum opinion dated March 22, 1977 upholding the constitutionality of RCW 47.42.030 and RCW 47.42.040, the court having made Findings of Fact and Conclusions of Law attached hereto, and being fully advised, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the provisions of RCW 47.42.030 and RCW 47.42.040 do not violate the defendants' First Amendment Rights of Free Speech, and the sign maintained by

defendants Larry E. Loew and Patricia E. Loew, his wife, as described in Appendix "A" attached hereto and alleged in plaintiff's petition is a public nuisance, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Loew are hereby permanently enjoined from maintaining said structure and are directed to remove said sign immediately and to not relocate said sign in violation of RCW 47.42 et seq.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if defendants fail to remove said structure as ordered herein, plaintiff may within thirty (30) days of entry of this judgment enter upon defendants' property and take down the subject sign and defendants shall reimburse plaintiff for all costs incurred for such removal.

DONE IN OPEN COURT this 3rd day of June, 1977.

Willard J. Roe
WILLARD J. ROE, Judge

Presented by:

SLADE GORTON
Attorney General

Approved as to form and Notice of Presentation waived:

Scott C. Neilson
SCOTT C. NEILSON
Assistant Attorney General, Attorney for plaintiff.

Larry M. Kristianson
LARRY M. KRISTIANSON
Attorney for defendants Loew.

DESCRIPTION

A back-to-back sign located in the NW 1/4 of the NW 1/4 of Section 21, Township 36 North, Range 38 East W.M.

SR 395, Palmer's Siding to Kettle Falls
on North Side of Highways
CS 3304 SRMP 237.46

APPENDIX "A"

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR STEVENS COUNTY

THE STATE OF WASHINGTON,
Plaintiff,
-vs-
ROSA F. MEYER; et al.,
Defendants.
NO. 20008
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on regularly for hearing before the court this day, plaintiff appearing by Scott C. Neilson, Assistant Attorney General, and defendants Rosa F. Meyer, Clifford E. Meyer, Marilyn J. Meyer (Reilly), Donald J. Meyer, Verla M. Meyer and Darrel Henyan, all appearing by Larry M. Kristianson of Skok & Kristianson, the parties agreeing

that no issues of fact exist, but only the constitutionality of RCW 47.42.030 and 040 is in issue, the parties stipulating that the sum of Two Thousand Forty and No/100 Dollars ($2,040.00) is just compensation if the statutes are constitutional, and having filed a memorandum opinion, the court having heard oral argument and considered the briefs, and being fully advised in the premises, makes the following:

FINDINGS OF FACT

I.

Plaintiff, Washington State Highway Commission, Department of Highways, is an administrative agency and commission of the State of Washington, charged with the statutory duty to construct and maintain state highways in the State of Washington.

II.

Defendants Rosa F. Meyer, Clifford

E. Meyer, Marilyn J. Meyer (Reilly), Donald J. Meyer and Verla M. Meyer, own the signs and Darrel Henyan owns the property located at Government Lots 1, 2, 3, 4 and 5, the South Half of the Northeast Quarter, the Southeast Quarter of the Northwest Quarter and the Southeast Quarter of Section 2, Township 29 North, Range 41 East, W.M.; the West Half of the Southwest Quarter and the Southwest Quarter of Section 35, Township 39 North, Range 41 East, W.M.; EXCEPT that portion of Government Lots 4 and 5 lying west of the right of way of the Great Northern Railway Company.

III.

SR 395 is a Federal Aid Primary Highway owned by plaintiff, State of Washington, and is a part of the Scenic and Recreational System.

IV.

The subject signs were erected and maintained by defendants.

V.

The signs were granted permit in 1972 by plaintiff pursuant to RCW 47.42.

VI.

The signs are visible from the main traveled portion of SR 395 and located outside a commercial or industrial area.

VII.

The subject signs are used to convey personal beliefs of the owners which are political or social in nature. The signs have never been used to convey commercial messages, nor leased to other parties.

VIII.

The signs existed prior to May 10, 1971.

IX.

The parties stipulate that the sum

of Two Thousand Forty and No/100 Dollars, ($2,040.00) constitutes just compensation for all rights to be acquired in this action.

From the foregoing Findings of Fact the court makes the following:

CONCLUSIONS OF LAW

I.

The court has jurisdiction over the parties and the subject matter.

II.

SR 395 is a highway protected under the provisions of RCW 47.42, and regulations promulgated thereunder.

III.

The named parties having an interest in the signs are entitled to just compensation pursuant to RCW 47.42.102.

IV.

By agreement of the parties the sum of Two Thousand Forty and No/100 Dollars

($2,040.00) is just compensation for all rights in the signs and leases thereunder.

V.

RCW 47.42.030 and 040 do not restrict defendants' free speech in violation of the First Amendment.

DATED this 3rd day of June, 1977.

Willard J. Roe
WILLARD J. ROE, Judge

Presented by:

SLADE GORTON
Attorney General

Scott C. Neilson
SCOTT C. NEILSON
Assistant Attorney General, Attorney for Plaintiff

Approved as to form and Notice of Presentation waived:

Larry M. Kristianson
LARRY M. KRISTIANSON
OF SKOK & KRISTIANSON
Attorney for Defendants Meyer and Henyan

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR STEVENS COUNTY
THE STATE OF WASHINGTON,
Plaintiff,
-vs-
ROSA F. MEYER; et al.,
Defendants.
NO. 20008
JUDGMENT ESTABLISHING
JUST COMPENSATION

This matter having come on regularly for trial by plaintiff's Complaint to Establish Compensation for Removal of Sign pursuant to RCW 47.42.103, plaintiff being represented by Slade Gorton, Attorney General, and Scott C. Neilson, Assistant Attorney General, defendants Rosa F. Meyer, Clifford E. Meyer, Marilyn J. Meyer (Reilly), Donald J. Meyer, Verla M. Meyer and Darrel Henyan, all being

represented by Larry M. Kristianson of Skok & Kristianson, and Evelyn Hope Meyer having been dismissed by order of the court, the parties having agreed that the Two Thousand Forty and No/100 Dollars ($2,040.00) offer of compensation for said sign is not in controversy and that the only issue before the court is the constitutionality of RCW 47.42.030 and RCW 47.42.040, the court having considered the records, briefs submitted, argument of counsel, and having made Findings of Fact, Conclusions of Law attached hereto, and the court having rendered a Memorandum Opinion dated March 22, 1977, holding that said statutes do not violate defendants' First Amendment Rights of Free Speech, and being fully advised, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Two Thousand Forty and No/100

Dollars ($2,040.00) is just compensation for the taking of property and/or property rights as described in Exhibit "A" attached hereto and made a part of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff shall pay the sum of Two Thousand Forty and No/100 Dollars ($2,040.00) as just compensation into the registry of the Stevens County Court and upon such payment plaintiff shall become the owner of the sign and/or property rights as described in Exhibit "A" and be allowed to enter defendants' property to remove said sign.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon payment of the above sum into the registry of the court, the clerk is hereby ordered to satisfy said judgment and to hold such sum of money for distribution subject to the further

order of this court.

DONE IN OPEN COURT this 3rd day of June, 1977.

Willard J. Roe
WILLARD J. ROE, Judge

Presented by:

SLADE GORTON
Attorney General

Approved as to Form and Notice of Presentation waived:

Scott C. Neilson
SCOTT C. NEILSON
Assistant Attorney General, Attorney for Plaintiff.

Larry M. Kristianson
LARRY M. KRISTIANSON of SKOK & KRISTIANSON, Attorney for Defendants Meyer and Henyan.

PARCELS 6-S 6333 & 6-S 6334
6-L 6333 & 6-L 6334

INTERESTED PARTIES: Rosa F. Meyer, Clifford E. Meyer; Marilyn J. Meyer; Donald J. Meyer; Darrel Henyan.

DESCRIPTION:

All right, title and interest in and to an advertising sign, including all rights in the current lease, if any, and also the right to lease said rights in the future, said sign and sign rights located in or appurtenant to the following described land:

Government Lots 1, 2, 3, 4, 5, the S 1/2 of the NE 1/4, the SE 1/4 of the NW 1/4 and the SE 1/4 of Section 2, Township 29 North, Range 41 East, W.M.; the W 1/2 of the SW 1/4 and the SW 1/4 of Section 35, Township 30 North, Range 41 East, W.M.; EXCEPT that portion of Government Lots 4 and 5 lying west of the right of way of the Great Northern Railway Company.

EXCEPT the right of way of the Great Northern Railway Company.

EXCEPT that portion of the SE 1/4 of said Section 2 described as follows: Beginning at a point 713 feet 9 inches north of the south one quarter corner of said Section 2; thence south 74 degrees 30' east 400 feet; thence north 326 feet 7 inches; thence north 74 degrees 30' west 400 feet; thence south 326 feet 7 inches to point of beginning.

EXCEPT right of way for State Road.

Situate in Stevens County, Washington.

HIGHWAY ADVERTISING CONTROL
SR 395, Deer Park to Loon Lake

EXHIBIT "A"

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON

IN AND FOR STEVENS COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

JACK M. LOTZE and BEVERLY J. LOTZE, his wife; et al.,

Defendants.

NO. 19970

NOTICE OF APPEAL

NOTICE is hereby given to the State of Washington, represented by Scott C. Neilson, 5th Floor, Highways - Licenses Building, Olympia, Washington, that Jack M. Lotze and Beverly J. Lotze, his wife; et al, appeals to Division III of the Court of Appeals from the judgment entered by the Superior Court in the State of Washington for Stevens County on June 10, 1977, in Stevens County Cause No. 19970.

Dated this 7th day of July, 1977.

Larry M. Kristianson
Larry M. Kristianson
Skok & Kristianson
Skok Building
Chewelah, Washington 99109

7/8/77

Copy mailed to Scott C. Neilson

and Larry M. Kristianson.

Blanche Goodfellow, Co. Clerk

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON

IN AND FOR STEVENS COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

LARRY A. LOEW and PATRICIA E. LOEW, his wife,

Defendants.

NO. 20007

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN to the State of Washington, represented by Scott C. Neilson, 5th Floor, Highways - Licenses Building, Olympia, Washington, that Larry A. Loew and Patricia E. Loew, his wife, appeals to Division III of the Court of Appeals from the judgment entered by the Superior Court in the State of Washington for Stevens County on June 13, 1977, in Stevens County Cause No. 20007.

Dated this 7th day of July, 1977.

Larry M. Kristianson
Larry M. Kristianson
Skok & Kristianson
Skok Building
Chewelah, Washington
99109

7/8/77

Copy mailed to Scott C. Neilson

& Larry M. Kristianson.

Blanche Goodfellow, County Clerk.

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON

IN AND FOR STEVENS COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

ROSA F. MEYER, et al.

Defendants.

NO. 20008

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN to the State of Washington, represented by Scott C. Neilson, 5th Floor, Highways - Licenses Building, Olympia, Washington, that Rosa F. Meyer, et al, appeals to Division III of the Court of Appeals from the judgment entered by the Superior Court in the State of Washington for Stevens County on June 13, 1977, in Stevens County Cause No. 20008.

Dated this 7th day of June, 1977.

Larry M. Kristianson
Larry M. Kristianson
Skok & Kristianson
Skok Building
Chewelah, Washington
99109

7/8/77

Copy mailed to Scott C. Neilson

& Larry M. Kristianson.

Blanche Goodfellow, County Clerk.

COURT OF APPEALS DIVISION III

STATE OF WASHINGTON

JACK M. LOTZE and BEVERLY J. LOTZE, his wife; and RONALD M. FROSTAD and FRANCES M. FROSTAD, his wife,	)	NO. 2485-III
Appellants	)	
-v-	)	
THE STATE OF WASHINGTON	)	
Respondent	)	

STIPULATED MOTION FOR CONSOLIDATION PURSUANT TO RAP 3.3 (b).

Comes now Larry M. Kristianson, attorney for the appellants, and Scott C. Neilson, attorney for the respondent, and respectfully move the Court that this case be consolidated together with Loew v. State, Cause No. 2487-III, and Meyer v. State, Cause No. 2486-III. The issues in each of these cases are identical and both parties will save time and expense if this motion is granted. We believe

the consolidation will provide for a fair review of all cases.

Dated at Chewelah, Washington, this 4th day of August, 1977, and at Olympia, Washington, this 8th day of August, 1977.

Larry M. Kristianson	Scott C. Neilson
Larry M. Kristianson Skok & Kristianson Attorney for Appellants	Scott C. Neilson Assistant Attorney General, Attorney for Respondent

The motions to consolidate Cause Nos. 2485-III, 2486-III, 2487-III are granted and the consolidated Cause No. is 2485-III.

August 17, 1977.

Michael F. Keyes
Commissioner

THE COURT OF APPEALS

OF THE

STATE OF WASHINGTON

DIVISION III

N. 500 Cedar
Spokane, Wash. 99201

STATE OF WASHINGTON, Respondent, -v- JACK M. LOTZE and BEVERLY J. LOTZE, his wife; and RONALD M. FROSTAD and FRANCES M. FROSTAD, his wife, Appellants.	)	NO. 2485-III DIVISION III

STATE OF WASHINGTON, Respondent, -v- ROSA F. MEYER, CLIFFORD E. MEYER, MARILYN J. MEYER (REILLY), DONALD J. MEYER, EVELYN HOPE MEYER and DARRELL HENYAN, Appellants.	)	NO. 2486-III

STATE OF WASHINGTON, Respondent, -v- LARRY A. LOEW and PATRICIA E. LOEW, his wife, Appellants.	)	NO. 2487-III

Having considered the briefs and record herein, the Court has determined this case presents an issue appropriate for Supreme Court review pursuant to RCW 2.06.030 because it draws into question the constitutionality of a statute, and involves a fundamental and urgent issue of broad public import requiring prompt and ultimate determination.

The certifiable issue is whether RCW 47.42.030 and RCW 47.42.040 unconstitutionally infringes free speech insofar as they prohibit posting of a sign conveying a social or political message when the sign is visible from a

highway.

THEREFORE, this case is certified to the Supreme Court.

DATED this 20th day of June, 1978.

Ray E. Munson
CHIEF JUDGE

[No. 45649. En Banc. April 19, 1979.]

THE STATE OF WASHINGTON, *Respondent*, v. JACK M. LOTZE, ET AL, *Appellants*.

THE STATE OF WASHINGTON, *Respondent*, v. ROSA F. MEYER, ET AL, *Appellants*.

THE STATE OF WASHINGTON, *Respondent*, v. LARRY A. LOEW, ET AL, *Appellants*.

[1] **Constitutional Law — Freedom of Speech — Restraints — Validity — Test.** A presumption exists against the constitutionality of a statute which imposes restraints upon a First Amendment freedom. When the statute is challenged on First Amendment grounds the State must establish a compelling state interest and a nexus of necessity between the statute and the State's legitimate interest.

[2] **Constitutional Law — Freedom of Speech — Restraints — Restriction as Opposed to Prohibition — Effect.** An exercise of the State's police power which regulates the time, place, and manner of speech must be considered differently than a total prohibition of speech. Reasonable restrictions may be imposed on speech, whether commercial or political, so long as the restriction is no greater than necessary to protect the State interest and leaves open ample alternative methods of communication. Reasonableness of restrictions is determined by balancing the public interest in the regulation against the extent of diminishment of First Amendment rights.

[3] **Highways — Billboards and Signs — Regulation — Validity.** RCW 47.42.030, .040, which prohibit certain signs along highways while permitting others, is a valid exercise of the State's police power insofar as it applies to signs expressing political beliefs where the restriction on speech is no greater than necessary to promote the legitimate and compelling State interest of traffic safety and aesthetic values.

WILLIAMS, J., did not participate in the disposition of this case.

Nature of Action: The State sought to remove signs adjacent to a highway under the authority of the scenic vistas act.

Superior Court: The Superior Court for Stevens County, Nos. 19970, 20007, 20008, Willard J. Roe, J.,

entered judgments in favor of the State on June 10 and 13, 1977, after rejecting challenges to the constitutionality of the statute.

Supreme Court: Holding that the statute meets the test for a state restraint on First Amendment rights, the court *affirms* the judgment.

Skok & Blake, Stephen Blake, and *Larry M. Kristianson,* for appellants.

Slade Gorton, Attorney General, and *Scott C. Neilson, Assistant,* for respondent.

HICKS, J.—This consolidated appeal involves three cases certified to this court by the Court of Appeals, Division Three. The sole issue presented is whether RCW 47.42.030[1] and .040[2] unconstitutionally infringe upon appellants' First Amendment rights of free speech. The trial court upheld the constitutionality of the statutes. We affirm.

According to the facts stipulated to the trial court, the defendants/appellants own real property in Stevens County bordering on U.S. Highway 395, which is a federal–aid primary highway and part of the scenic highway system. The

[1]"Except as permitted under this chapter, no person shall erect or maintain a sign which is visible from the main traveled way of the interstate system, the primary system, or the scenic system. In case a highway or a section of highway is both a part of the primary system and the scenic system, only those signs permitted along the scenic system shall be erected or maintained." RCW 47.42.030.

[2]RCW 47.42.040 reads in part as follows:
"It is declared to be the policy of the state that no signs which are visible from the main traveled way of the interstate system, primary system, or scenic system shall be erected or maintained except the following types:
"(1) Directional or other official signs or notices that are required or authorized by law;
"(2) Signs advertising the sale or lease of the property upon which they are located;
"(3) Signs advertising activities conducted on the property on which they are located;
". . .
"Only signs of type 1, 2 and 3 shall be erected or maintained within view of the scenic system."

property is located in a noncommercial, nonindustrial area. Appellants maintain signs on their property which are visible from the highway and within 660 feet of the right–of–way. These signs convey the owners' personal beliefs of a political or social nature. The parties agree that appellants' signs are prohibited under RCW 47.42, a composite of the Highway Advertising Control Act of 1961 (Laws of 1961, ch. 96, § 17, p. 1575) and the Scenic Vistas Act of 1971 (Laws of 1971, 1st Ex. Sess., ch. 62, § 19, p. 485). The State filed complaints seeking to obtain orders of removal. In two cases the State sought to establish reasonable compensation pursuant to RCW 47.42.103. In the third case the State petitioned for abatement of an alleged nuisance.[3] RCW 47.42.080.

The leading decision interpreting Washington's highway sign law (RCW 47.42), is *Markham Advertising Co. v. State,* 73 Wn.2d 405, 439 P.2d 248 (1968), *appeal dismissed,* 393 U.S. 316, 21 L. Ed. 2d 512, 89 S. Ct. 553, *rehearing denied,* 393 U.S. 1112, 21 L. Ed. 2d 813, 89 S. Ct. 854 (1969). In that case, several outdoor advertising companies challenged the Highway Advertising Control Act of 1961 on constitutional grounds. The trial consisted of a lengthy examination of the relationship of highway signs and highway safety. This court upheld the act as a proper exercise of the state's police power. The court found a substantial relation between the regulation of billboard advertising along highways and the legitimate public purpose of promoting traffic safety. In addition, the court recognized preservation of aesthetic values as a legitimate concern within the scope of the police power.

In addressing appellants' First Amendment challenge to the Highway Advertising Control Act of 1961, the *Markham* court relied upon the distinction between "purely commercial advertising" and other forms of speech, as

[3]In oral argument before this court, the State indicated that it proceeded against the sign involved in State v. Loew, cause No. 20007, under RCW 47.42.080 because the owners had failed to obtain a permit under the act.

delineated by the United States Supreme Court in *Valentine v. Chrestensen*, 316 U.S. 52, 86 L. Ed. 1262, 62 S. Ct. 920 (1942). *Markham Advertising Co. v. State, supra.* The *Markham* court rejected the free speech claims of the commercial advertisers as "minimal", concluding at page 429:

> This intrusive quality of highway outdoor advertising, coupled with the hazard it poses to traffic safety and its purely commercial nature, all persuade us that RCW 47.42 is a reasonable regulation which does not violate the First Amendment.

The Scenic Vistas Act of 1971 substantially amended the 1961 act upheld in *Markham*. Visibility became the regulatory criterion, and compensation provisions were added. The declaration of purposes section of the current act includes: promotion of health, safety, welfare, convenience and enjoyment of the traveling public, protecting the public investment in highways, attracting visitors by conserving natural beauty, and ensuring the safe and effective presentation of information of specific interest to travelers. RCW 47.42.010.

RCW 47.42.030 contains a sweeping prohibition against signs visible from interstate, primary or scenic systems except as permitted under the act. "Sign" is broadly defined under the act to include any outdoor sign, display, billboard "or other thing which is designed, intended or used to advertise or inform . . ." RCW 47.42.020(8). The act does not prohibit all visible signs within 660 feet of a primary system. RCW 47.42.040 delineates several exceptions to the broad prohibition of RCW 47.42.030, including: directional signs, official signs, signs advertising the sale or lease of property upon which they are located, signs advertising activities conducted on the property on which they are located. Such signs are permissible within view of a scenic system subject to size, location, and number regulations. RCW 47.42.045, .046. None of the excepted sign types, however, apply to appellants' signs. The act also allows signs adjacent to highways within commercial or

industrial areas, as defined by section .020, subject to certain size and spacing restrictions under sections .062 and .063.

Washington's current sign law meets the compliance requirements of Title 1 of the federal Highway Beautification Act of 1965, Pub. L. No. 89-285, Oct. 22, 1965, 79 Stat. 1028, 23 U.S.C. § 131 (1976). The federal act provides that a state must establish "effective control" of highway advertising along federal-aid highways to avoid a 10 percent reduction in its portion of federal highway funds. 23 U.S.C. § 131(b) (1976).

We examine appellants' challenge to RCW 47.42 in light of *Markham* and First Amendment doctrine. In *Markham*, the court dismissed as "minimal" the First Amendment interests asserted by commercial advertisers. We relied upon the commercial speech "exception" to First Amendment protection, a distinction that has never been clear cut or all inclusive. *See, e.g., Murdock v. Pennsylvania,* 319 U.S. 105, 110-11, 87 L. Ed. 1292, 63 S. Ct. 870, 146 A.L.R. 81 (1943); *New York Times Co. v. Sullivan,* 376 U.S. 254, 256, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964). The purported dichotomy between commercial speech and other forms of speech has eroded since the *Markham* decision. Two recent cases have attenuated the commercial speech exception to First Amendment protection. *See Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976); *Bigelow v. Virginia,* 421 U.S. 809, 44 L. Ed. 2d 600, 95 S. Ct. 2222 (1975).

Whatever the residual distinctions between the *degree* of First Amendment protection accorded commercial and other forms of protected speech, appellants assert that their First Amendment interests in purely political expression are entitled to a higher degree of protection than that accorded commercial billboards in *Markham*. We agree. Thus, we must ascertain the appropriate standard by which to review appellants' free speech challenge.

[1] The State acknowledges that when a statute based on its police power is challenged on First Amendment grounds, it must (1) establish a compelling state interest, and (2) demonstrate a nexus of "necessity" between the statute and the State's asserted interest. *See, e.g., State v. Conifer Enterprises, Inc.*, 82 Wn.2d 94, 508 P.2d 149 (1973). Further, a statutory restraint imposed upon a First Amendment freedom bears a heavy presumption against its constitutionality. *Freedman v. Maryland*, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965).

The State argues that the challenged statutes satisfy the two-pronged *Conifer* test. It asserts that the state's compelling interest in traffic safety as established in *Markham*, and unrefuted in the instant cases, justifies the limitation on First Amendment freedoms. The State concedes that no compelling state interest exists if the statutory purposes could be achieved by less drastic means. *See Shelton v. Tucker*, 364 U.S. 479, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960). It argues that the statutes are sufficiently "refined" to restrain speech only to the extent necessary to promote the state's interest in traffic safety and aesthetic values.

While they do not refute the traffic safety rationale established in *Markham*, appellants argue that *Markham* is distinguishable as it dealt only with commercial signs. It is the State's position that *Markham*'s demonstrated and judicially approved rationale of highway safety will not support content-based distinctions between signs bearing commercial and noncommercial messages. The State claims that there is no difference in the effect on the motorist between commercial and noncommercial signs. With this contention, we agree, and therein lies the problem. The statutory scheme allows certain signs along scenic highways, such as on-premise advertising and realty "for sale" signs. RCW 47.42.040. These delineated exceptions pertain only to commercial signs, however, and do not encompass appellants' political signs.

As we have discussed above, RCW 47.42 is not a blanket exclusion of signs along protected highways. The exceptions

applicable to the area where appellants' signs are located, however, basically are for commercial speech. Although, for First Amendment protection, the distinction between commercial speech and other speech has been considerably blurred by *Bigelow v. Virginia, supra*, and *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, political speech should continue to be accorded whatever residual preference remains. What then is the justification for the scheme contained in RCW 47.42 where the authorized exceptions permitted come down on the side of commercial speech?

[2] The State, of course, may regulate the time, place and manner of speech. Such statutes stand on different footing than laws prohibiting speech altogether. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 94-95, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977). In *Linmark*, the court held that an ordinance which selectively prohibited realty "for sale" or "sold" signs, regardless of size or shape, was not "genuinely concerned" with place or manner of speech in order "to promote a value unrelated to its suppression." The court specifically noted that accordingly, it did not "decide whether a ban or signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression", citing *Markham Advertising Co. v. State*, 73 Wn.2d 405, 439 P.2d 248 (1968). *Linmark*, at 94 n.7. Reasonable restrictions furthering a legitimate state interest may be imposed. *Kovacs v. Cooper*, 336 U.S. 77, 85-86, 93 L. Ed. 513, 69 S. Ct. 448 (1949). The reasonableness of a time, place and manner restriction, we believe, is to be determined by balancing the public interest advanced by the regulation against the extent of the restriction on First Amendment rights.

Incidental restrictions on the exercise of First Amendment rights have been permitted to the extent they further a compelling state interest which is unrelated to the suppression of expression and is substantial in relation to the restriction imposed. The restriction must be no greater than necessary to protect the governmental interest and

must leave open "'ample alternative channels for communication'". *Linmark*, at 93.

[3] Here, the compelling state interests are traffic safety and aesthetic values, together with a number of other interests which, in the context of these cases, may be of somewhat lesser import. To achieve these interests, the legislature in RCW 47.42 has first decreed that there be no signs and then has granted certain exceptions. The exceptions appear to be tied to necessity. As in *Linmark*, the permitted signs are linked to specific property and its use. Certain limitations are imposed on size, number and distances. RCW 47.42.045. Short of permitting the signs, it is difficult to visualize how the particular message could be conveyed to those deemed most important to be reached, *i.e.*, those in the immediate vicinity of the property.

Appellants, however, assert that the statute as applied to them is, in effect, a total denial of speech as they have no effective alternative channels of communication. We disagree. Political and cultural messages are not normally confined to a particular situs for their efficacy and may be communicated by less visually damaging channels than billboards adjacent to scenic highways. While a political message may be relevant to a particular locale, it need not be linked with a specific property site in order to derive meaning. Unlike on-premise business signs and realty "for sale" signs, political messages such as those of appellants are addressed to the general universality of political ideas.

A total prohibition of on-premise business signs or realty "for sale" signs, on the other hand, may violate the First Amendment under *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, and its progeny. Such a prohibition may deny the only available channel of communication to one trying to *identify*, rather than merely advertise his business or property. *See Linmark Assocs., Inc. v. Willingboro, supra; see also* J. Lucking, *The Regulation of Outdoor Advertising: Past, Present and Future*, 6 Environmental Affairs 179 (1977).

We conclude that RCW 47.42 as applied to appellants' billboards does not violate their First Amendment rights of free speech. The traffic safety rationale upheld in *Markham Advertising Co. v. State, supra*, and not refuted at trial in these cases is sufficiently compelling to outweigh the minimal restraint on appellants. The statutory scheme represents a reasonable place and manner limitation on speech leaving ample alternative channels of communication for appellants. Appellants' speech is not in any way being controlled as to content; its stricture is narrowly confined to place and manner. The entire panoply of means to communicate their views is open to appellants except for the limited restrictions of RCW 47.42.

Appellants invite us to preclude all signs on scenic highways if their political signs are to be totally constrained. Such a proposal is more fittingly directed to the legislature than to this court.

The trial court is affirmed.

UTTER, C.J., and ROSELLINI, STAFFORD, WRIGHT, BRACHTENBACH, HOROWITZ, and DOLLIVER, JJ., concur.

THE NEXT PAGE IS NUMBERED 1101
to permit publication of rules of court in the advance sheets of the Washington Reports with permanent page numbers and make permanent citations immediately available.

SUPREME COURT OF THE

STATE OF WASHINGTON

THE STATE OF WASHINGTON Respondent, -v- JACK M. LOTZE, ET AL, Appellants, THE STATE OF WASHINGTON, Respondent -v- ROSA F. MEYER, ET AL, Appellants THE STATE OF WASHINGTON, Respondent -v- LARRY A. LOEW, ET AL Appellants.	NO. 45649

MOTION FOR RECONSIDERATION OF

DECISION TERMINATING REVIEW.

1. Identity of Moving Party:

Jack M. Lotze, et al, Rosa F. Meyer, et al, and Larry A. Loew, et al, appellants, ask for the relief designated in Paragraph 2.

2. Statement of Relief Sought:

Reconsideration and modification of the decision of the Supreme Court filed on April 19, 1979. This Court should reverse the decision of the trial court.

3. Facts Relevant to Motion:

The Record on Appeal is incorporated herein by reference.

4. Grounds for Relief and Argument:

Appellants respectfully suggest that the exceptions contained in RCW 47.42 to the prohibition of signs along scenic highways are not tied to necessity and do not validly discriminate between the signs herein questioned and the signs which are allowed.

RCW 47.42.040 authorizes three types

of signs along scenic highways. These exceptions are for advertising activities conducted on the property where the signs are located, advertising the sale or lease of the property where the signs are located, and for directional or official signs or notices required or authorized by law. RCW 47.42.045 regulates what is referred to as "type three signs" as defined in RCW 47.42.040, signs advertising activities conducted on the property. Additionally, however, RCW 47.42.047 authorizes the Washington State Highway Commission to erect and maintain "specific information panels" within the right of way of the scenic system. This section does not seem to place any specific limits on these commercial signs in relationship to the location of the business except that the businesses must be accessible by way of intersecting high-

ways. This statute effectively places the State in the business of advertising businesses which are not necessarily located adjacent to the scenic highway in question. The signs may contain more content than is "necessary" for the traveling public, and would seem to be just as dangerous for traffic safety and damaging to aesthetic values as the political signs which are the subject of this action.

Your appellants respectfully suggest that the exceptions allowed in the statutory scheme of RCW 47.42 are too broad to establish the requisite "necessity" to overcome the heavy presumption against the constitutionality of these restraints.

Dated this 3rd day of May, 1979.

Respectfully submitted,

Stephen R. Blake
Stephen R. Blake
Skok & Blake
Attorneys for Appellants

THE SUPREME COURT OF THE
STATE OF WASHINGTON

THE STATE OF WASHINGTON Respondent -v- JACK M. LOTZE, ET AL Appellants	NO. 45649
THE STATE OF WASHINGTON Respondent -v- ROSA F. MEYER, ET AL Appellants	
THE STATE OF WASHINGTON Respondent -v- LARRY A. LOEW, ET AL Appellants	

ORDER DENYING MOTION FOR
RECONSIDERATION

The Court having unanimously decided that the appellants' motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 7th day of June, 1979.

Robert F. Utter
Chief Justice

IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

THE STATE OF WASHINGTON)
)
Respondent)
)
)
-v-)
)
JACK M. LOTZE AND BEVERLY)
J. LOTZE, his wife;)
RONALD M. FROSTAD and)
FRANCES M. FROSTAD, his)
wife, et al.,)
)
Appellants)
)

MANDATE

No. 45649

Stevens County No. 19970

Court of Appeals Nos. 2485-III

2486-III and 2487-III.

The State of Washington to: The Superior Court of the State of Washington, in and for Stevens County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 19, 1979, became

the decision terminating review of this court in the above entitled case on June 9, 1979. This cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $59.59 in favor of respondent and against appellant Lotze, et al.

JJC:dd

cc: Reporter of Decisions
Court of Appeals, Div. III
Skok & Blake
Mr. Larry M. Kristianson
Mr. Stephen R. Blake
Hon. Slade Gorton
Mr. Scott C. Neilson, Ass't

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the sea of said Court at Olympia, this 11th day of June, 1979.

John J. Champagne
John J. Champagne
Clerk of the Supreme Court
State of Washington

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Appellee,

v.

JACK M. LOTZE and BEVERLY J. LOTZE, his wife; RONALD M. FROSTAD and FRANCES M. FROSTAD, his wife; ROSA F. MEYER; CLIFFORD E. MEYER; MARILYN J. MEYER; DONALD J. MEYER and EVELYN HOPE MEYER; DARREL HENYAN; LARRY A. LOWE and PATRICIA E. LOWE, his wife,

Appellants.

SUPREME COURT NO. 45649

COURT OF APPEALS NOS. 2485-III, 2486-III, 2487-III

STEVENS COUNTY NOS. 19970, 20007, 20008.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Jack M. Lotze and Beverly J. Lotze, his wife; Ronald M. Frostad and Frances M. Frostad, his wife; Rosa F. Meyer; Clifford E. Meyer; Marilyn J. Meyer; Donald J. Meyer and Evelyn Hope Meyer, his wife; Darrel Henyan; Larry A. Lowe and Patricia E. Lowe, his wife, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington affiring the judgments of the Superior Court of the State of Washington in and for Stevens County filed in this action on April 19, 1979, for which an Order Denying Motion for Reconsideration, dated June 7, 1979, was entered on June 8, 1979, and for which the Mandate was

issued terminating review on June 9, 1979. The decisions of the Superior Court of the State of Washington in and for Stevens County were entered on June 10 and 13, 1977, and rejected challenges to the constitutionality of RCW 47.42.030 and .040. This appeal is taken pursuant to 28 USC 1257(2).

Stephen R. Blake

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PROOF OF SERVICE

I, Robin Chapman, a secretary in the office of Stephen R. Blake, attorney of record for the appellants herein, depose and say that on the 28-th day of August, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the State of Washington, appellee herein, by depositing a copy of the same in a United States Post Office, with first class postage prepaid, addressed to counsel of record for the State of Washington, Slade Gorton, Attorney General, Temple of Justice, Olympia, Washington 98504, and Scott C. Neilson, Assistant Attorney General, Fifth

Floor, Highways-Licenses Building, Olympia, Washington 98504.

Robin Chapman

Subscribed and sworn to before me this 28th day of August, 1979.

Stephen R. Blake
Notary Public in and for the State of Washington, residing at Chewelah

APPENDIX B

47.42.040
PERMISSIBLE SIGNS CLASSIFIED

It is declared to be the policy of the state that no signs which are visible from the main traveled way of the interstate system, primary system, or scenic system shall be erected or maintained except the following types:

(1) Directional or other official signs or notices that are required or authorized by law;

(2) Signs advertising the sale or lease of the property upon which they are located;

(3) Signs advertising activities conducted on the property on which they are located;

(4) Signs not inconsistent with the policy of this chapter and the national policy set forth in section

131 of title 23, United States Code as codified and enacted by Public Law 85-767 and amended only by section 106, Public Law 86-342, and the national standards promulgated thereunder by the secretary of commerce or the secretary of transportation, advertising activities being conducted at a location within twelve miles of the point at which such signs are located: provided, that no sign lawfully erected pursuant to this subsection adjacent to the interstate system and outside commercial and industrial areas shall be maintained by any person after three years from May 10, 1971;

(5) Signs not inconsistent with the policy of this chapter and the national policy set forth in section 131 of title 23, United States Code, as codified and enacted by Public Law 85-767 and amended only by section 106,

Public Law 86-342, and the regulations promulgated thereunder by the secretary of commerce or the secretary of transportation, designed to give information in the specific interest of the traveling public: provided, that no sign lawfully erected pursuant to this subsection adjacent to the interstate system and outside commercial and industrial areas shall be maintained by any person after three years from May 10, 1971;

(6) Signs lawfully in existence on October 22, 1965, determined by the commission, subject to the approval of the United States secretary of transportation, to be landmark signs, including signs on farm structures or natural surfacesm of historic or artistic significance the preservation of which would be consistent with the

purposes of chapter 47.42 RCW.

Only signs of type 1, 2 and 3 shall be erected or maintained within view of the scenic system.